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Tan Kim Chuan v Tan Kim Tian & Ors and another appeal

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-16–03 OF 2021(W) AND 02(i)-17–03 OF 2021(W)
AZAHAR MOHAMED CJ (MALAYA), HASNAH HASHIM AND RHODZARIAH BUJANG FCJ
22 SEPTEMBER 2022

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Companies and Corporations — Liquidators — Application for directions — Conflicting opinions of joint liquidators as to methods of realisation of properties — Whether decision of court under s 487(3) of Companies Act 2016 was appealable — Whether realisation of assets ought to be proceeded as initially agreed

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Properland Realty Sdn Bhd ('Properland') was a real estate investment company. The shareholding of Properland was equally held by the brothers, Tan Kim Tian ('TKT') and Tan Kim Chuan ('TKC'); the only directors and contributories of Properland. Tan Beng Seng (M) Sdn Bhd ('TBS')('the petitioner'), was another family company incorporated by TKT and TKC's father. Following the demise of their father, TKT took over the management of TBS while TKC set up another company, Cemerlang Raya Sdn Bhd. TBS obtained judgment in default of appearance ('JID') against Properland and Properland was wound up. Upon the winding-up order, the official receiver was appointed as its liquidator. Subsequently, Yew Fooi and Onn Kien Hoe were appointed as joint liquidators of Properland. Yew Fooi and Onn Kien Hoe had initially agreed that it would be in the best interest of the wound up company to dispose the properties by way of first right of refusal. However, Onn Kien Hoe changed his mind and agreed with TKC that the best method of disposal would be by open tender. Due to the conflicting opinions of the joint liquidators as to the methods of realisation of the properties, the joint liquidators as well as the contributories filed separate applications seeking the High Court's directions. The learned High Court judge concluded that since TKC, as well as Onn Kien Hoe objected to the method that was initially agreed upon, the proposal by the joint liquidators would not be the best option and instead a sale by open tender would be in the best interest of Properland and the contributories. Aggrieved by the decision of the High Court, TKT and the petitioner appealed against the decision of the High Court. The Court of Appeal allowed the appeals and hence these appeals by TKC.

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Held, dismissing the appeals:

(1) The appointed administrator of the wound-up company, the joint liquidators, hold divergent views on the methods of realisation of the assets. A liquidator must at all times be impartial, independent, and be seen to be independent. The joint liquidators were clearly not ad idem and in conflict between themselves and also the contributories as to the best method of realisation of the properties. The divergent views of the joint liquidators not only place both the liquidators in an awkward position but also impeded the liquidation process. The applications and the orders sought by the various parties, that was, the liquidators as well as the two contributors affect the substantive rights of the parties impacted by the liquidation. The decision of the High Court was certainly not purely advisory and neither was it purely supervisory in nature. The order was a judgment that fell within the ambit of s 67(1) of the Courts of Judicature Act 1964 and was therefore appealable (see paras 37 & 39–40).

(2) The learned judge was plainly wrong to form her own view that due to the objection, it was not appropriate to dispose of the properties in the way the joint liquidators originally agreed. The learned judge should have instead directed that the properties be disposed of according to the agreed arrangement taken by the joint liquidators as the arrangement would be in the best interest of the company and contributories as well as to expedite the liquidation process (see para 49).

[Bahasa Malaysia summary

Properland Realty Sdn Bhd ('Properland') adalah sebuah syarikat pelaburan hartanah. Pegangan saham Properland dipegang sama rata oleh adik beradik, Tan Kim Tian ('TKT') dan Tan Kim Chuan ('TKC'); satu-satunya pengarah dan penyumbang Properland. Tan Beng Seng (M) Sdn Bhd ('TBS')('pemohon'), adalah sebuah lagi syarikat keluarga yang diperbadankan oleh bapa TKT dan TKC. Berikutan kematian bapa mereka, TKT mengambil alih pengurusan TBS manakala TKC menubuhkan sebuah lagi syarikat, Cemerlang Raya Sdn Bhd. TBS memperoleh penghakiman ingkar kehadiran ('JID') terhadap Properland dan Properland telah digulung. Selepas perintah penggulungan, penerima rasmi dilantik sebagai pelikuidasinya. Selepas itu, Yew Fooi dan Onn Kien Hoe dilantik sebagai pelikuidasi bersama kepada Properland. Yew Fooi dan Onn Kien Hoe pada mulanya bersetuju bahawa ia adalah demi kepentingan syarikat yang telah digulung untuk melupuskan harta-harta melalui hak keutamaan terdahulu. Walau bagaimanapun, Onn Kien Hoe mengubah fikirannya dan bersetuju dengan TKC bahawa kaedah pelupusan terbaik adalah melalui tender terbuka. Disebabkan oleh percanggahan pendapat pelikuidasi bersama mengenai kaedah penghasilan hartanah, pelikuidasi bersama serta penyumbang memfailkan permohonan berasingan untuk mendapatkan arahan Mahkamah Tinggi. Hakim Mahkamah Tinggi yang bijaksana membuat kesimpulan bahawa

memandangkan TKC, serta Onn Kien Hoe membantah kaedah yang dipersetujui pada mulanya, cadangan pelikuidasi bersama bukanlah pilihan terbaik dan sebaliknya penjualan melalui tender terbuka adalah yang terbaik terhadap kepentingan Properland dan penyumbang. Terkilan dengan keputusan Mahkamah Tinggi, TKT dan pempetisyen merayu terhadap keputusan Mahkamah Tinggi. Mahkamah Rayuan membenarkan rayuan dan oleh itu rayuan ini oleh TKC

Diputuskan, menolak rayuan-rayuan:

(1) Pentadbir syarikat penggulungan yang dilantik, pelikuidasi bersama, mempunyai pandangan yang berbeza tentang kaedah penghasilan aset. Pelikuidasi mestilah pada setiap masa bersikap saksama, bebas, dan dilihat bebas. Pelikuidasi bersama jelas tidak ad idem dan berkonflik antara mereka dan juga penyumbang mengenai kaedah terbaik untuk penghasilan hartanah. Pandangan berbeza pelikuidasi bersama bukan sahaja meletakkan kedua-dua pelikuidasi dalam kedudukan yang janggal tetapi juga menghalang proses likuidasi. Permohonan dan perintah yang dipohon oleh pelbagai pihak, iaitu pelikuidasi serta kedua-dua penyumbang menjejaskan hak substantif pihak yang terjejas oleh likuidasi. Keputusan Mahkamah Tinggi tentu sahaja bukan nasihat semata-mata dan juga bukan penyeliaan semata-mata. Perintah itu adalah penghakiman yang termasuk dalam lingkungan s 67(1) Akta Mahkamah Kehakiman 1964 dan oleh itu boleh dirayu (lihat perenggan 37, 39–40).

(2) Hakim yang bijaksana adalah jelas salah untuk membentuk pandangannya sendiri bahawa disebabkan bantahan itu, adalah tidak wajar untuk melupuskan harta-harta itu dengan cara yang dipersetujui oleh pelikuidasi bersama. Hakim yang bijaksana sepatutnya mengarahkan supaya harta itu dilupuskan mengikut pengaturan yang dipersetujui oleh pelikuidasi bersama kerana pengaturan itu adalah demi kepentingan terbaik syarikat dan penyumbang serta mempercepatkan proses likuidasi (lihat perenggan 49).]

(3)

Cases referred to

Equiticorp Holdings Ltd (in statutory management) v Mak Kum Choon & Ors and another appeal [2020] 6 MLJ 1, CA (refd)

Estate of Lim Tuan & Ors v Lim San Peen & Ors [2019] 2 MLJ 306; [2019] 6 CLJ 463, CA (refd)

Ng Yok Gee & Anor v CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, intervener) [2003] MLJU 835; [2006] 3 CLJ 360, HC (refd)

Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors [2012] 2 MLJ 713; [2012] 2 CLJ 501, FC (refd)

A *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629; [2013] 3 CLJ 17, FC (refd)

Legislation referred to

B Companies Act 1965 (repealed by Companies Act 2016) ss 236, 236(2), (3), 237, 237(3)
Companies (Winding-Up) Rules 1972
Companies Act 2016 ss 478, 486, 486(1)(a), (2), 487(3)
Courts of Judicature Act 1964 s 67(1)
C Rules of Court 2012 O 92 r 4

Appeal from: *Tan Kim Tian & Anor v Tan Kim Chuan & Anor* [2020] MLJU 86 (Court of Appeal, Putrajaya)

David Hoh (with Cassandra Choo) (Lim & Hoh) for appellant.
D *Ashok Kandiah (with David Soosay and Norvindran Sivarajah) (Kandiah Partnership) for the first and second respondent.*
Low Kam Fai (with Lim Zhi Jun) (KF Low & Co) for Onn Kien Hoe for the third respondent (Onn Kien Hoe).
E *Owee Chia Ming (with Shermaljit Singh) (Owee & Co) for Yew Fooi for the third respondent (Yew Fooi).*

Hasnah Hashim FCJ (delivering judgment of the court):

F INTRODUCTION

[1] The two related appeals raised questions of some significance arising out of the applications filed by the parties pursuant to s 487(3) of the Companies Act 2016 ('Act 777'); the provision is similar to s 237(3) of the Companies Act 1965 ('the CA 1965').
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[2] On 26 February 2021, this court granted the appellant leave to appeal in respect to the following questions of law:

H Question 1:

In a situation where the High Court has given joint liquidators non-appealable directions (by way of advice in an administrative proceeding) under s 237(3) of the Companies Act 1965 (s 487(3) of the Companies Act 2016) ('liquidators (sic) application'):

I (a) whether the decisions pertaining to contributories (sic) applications under s 236(3) of the Companies Act 1965 (s 486(2) of the Companies Act 2016) in respect of the exercise or proposed exercise of liquidators (sic) power by contributories ('contributories (sic) application') and/or by other parties, can be appealed against if dismissed? and

(b) whether other parties (who are neither applicants nor parties in contributories (sic) application (sic), can appeal against the High Court liquidator's directions (for the dismissal of a contributories (sic) application) to back door circumvent the Kuala Lumpur High Court directions and Federal Court Decision of *Ooi Woon Chee*?

Question 2:

(a) whether a petitioner and/or judgement creditor for a monetary debt that wound up the judgment debtor company based on a default judgment for a liquidated sum, can be given an equitable right by the Court of Appeal's original or appellate jurisdiction when the same had no prior contractual nor equitable rights for such a preferential right to be in existence or given; and

(b) whether a contributory and/or creditor, can be given an equitable right by the Court of Appeal by its original or appellate jurisdiction when the same had no prior contractual nor equitable rights in existence for such rights to be given.

Question 3:

Whether an order granted by the High Court pursuant to a contributories (sic) application (which mirrors the non-appealable directions of the High Court to the liquidator pursuant to a liquidator's application) can be appealed against by another contributory?

Question 4:

Where a contributories (sic) application which does not seek any determination of substantive rights (only to set/ company assets in liquidation by way of open tender):

(a) whether such an order (not determining any substantive right granted by the High Court) is a decision and/or judgment or order within the scope of s 67(1) of the Courts of Judicature Act 1964 which is non-appealable?

Question 5:

Whether the Court of Appeal's decision in *Estate of Lim Tuan & Ors v Lim San Peen & Ors* [2019] 2 MLJ 306; [2019] 6 CLJ 463 (where court directions to liquidators can be appealed by other parties if the rights of other parties are affected) circumvent the Federal Court decision in *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 at p 740–741; [2012] 2 CLJ 501 at p 533–544 that court directions to the liquidator (by way of advice in an administrative proceeding) are non-appealable?

Question 6:

Whether the Court of Appeal can exercise an original jurisdiction to set aside the decision of the High Court (in dismissing the contributory's application) and substitute its own different direction when the High Court had already prior to that exercised its discretion and directed the joint liquidators to sell the land by open tender, ie a fair open market transparent auction/bidding method in the best interest of that company in liquidation to sell at the highest price.

Question 7:

Whether if in a joint liquidators (sic) situation, where both the joint liquidators have separately applied to the High Court for directions to sell the land in question by different methods and the High Court has specifically directed and/or preferred one method (to realise properties by open tender to the highest bidder) over another method (to give a preference to a particular contributory), can the Court of Appeal then apply its jurisdiction (original or appellate) to intervene without basis and make an order contrary to the directions and findings of the High Court therein.

Question 8:

Whether in an instance where two independent joint liquidators have been appointed for one liquidation process, can the Court of Appeal (where there is no misapprehension of law and/or fact by the High Court) disregard the directions of the High Court and/or will of one of the joint liquidators and prefer the view of the other, in complete disregard of the findings and directions of the High Court below, and unilaterally and/or on its own volition decide on a 'proper' and/or different method of realization of the said properties in liquidation?

MATERIAL FACTS

[3] The facts and the relationship between the parties are largely undisputed. Properland Realty Sdn Bhd ('Properland') is a real estate investment company incorporated on 22 March 1979. The shareholding of Properland is equally held by the brothers, Tan Kim Tian ('TKT') and Tan Kim Chuan ('TKC'); the only directors and contributories of Properland. Properland is the registered owner of the disputed immovable properties:

(a) land held under Geran 74267, Lot No 18091, Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan bearing postal address at Lot PT14, Jalan Kuang Bulan, Kepong Garden Industrial Area, 52100 Kuala Lumpur ('Lot 14');

(b) land held under Geran 66196, Lot No 18751, Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan bearing postal address at Lot PT 936, Jalan Kuang Cermin 2, Taman Kepong, 52100 Kuala Lumpur ('Lot 949'); and

(c) land held under Geran 50501, Lot 18059, Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan bearing postal address at Lot A21, Jalan Kuang Bulan, Kepong Garden Industrial Area, 52100 Kuala Lumpur ('Lot 21').

(Lot 14, Lot 949 and Lot 21 collectively referred as 'Properland properties'.)

[4] Tan Beng Seng (M) Sdn Bhd ('TBS'), ('the petitioner') is another family company incorporated on 22 March 1979 by TKT and TKC's father. Following the demise of their father, TKT took over the management of TBS while TKC set up another company, Cemerlang Raya Sdn Bhd ('Cemerlang'). It is an undisputed fact that TKT is the ultimate will and mind of TBS. On 16 March 1999, TBS obtained judgment in default of appearance ('JID') against Properland for a sum of RM1,647,836.63. Based on the JID, Properland was wound up on 29 March 2000. Upon the winding-up order, the official receiver ('OR') was appointed as its liquidator. Subsequently, Yew Fooi and Onn Kien Hoe were appointed as joint liquidators of Properland on 25 March 2015.

[5] After their appointment as joint liquidators, Yew Fooi and Onn Kien Hoe had initially agreed that it would be in the best interest of the wound up company to dispose the properties by way of first right of refusal. However, Onn Kien Hoe changed his mind and agreed with TKC that the best method of disposal would be by open tender.

[6] Due to the conflicting opinions of the joint liquidators as to the methods of realisation of the Properland properties in particular Lot 14 and Lot 21, the joint liquidators as well as the contributories filed separate applications seeking the High Court's directions as follows:

(a) Yew Fooi, one of the joint liquidators, filed a notice of motion dated 2 March 2017 pursuant to s 237(3) of the CA 1965 and the Companies (Winding-Up) Rules 1972 and/or inherent jurisdiction of the Court seeking an order to offer on a first right of refusal to sell to TKT and/or the petitioner at the price of RM10,075,000 for Lot 21, to sell Lot 14 to TKC and/or Cemerlang at the price of RM19m, and PT 949 to sell to TKC at the price of RM2,300,000 ('encl 63');

(b) Onn Kien Hoe, the other liquidator filed an application pursuant to ss 478, 487(3), 486(1)(a) of the Companies Act 2016 and O 92 r 4 of the Rules of Court 2012 seeking, inter alia, that: (a) Lot 14 and PT 949 be sold by way of public tender to the highest bidder; and (b) Lot 21 will also be sold by public tender and first right of refusal will be offered to the petitioner at the highest tender price ('encl 67');

(c) TKT filed an application pursuant to s 486 of the Companies Act 2016

and/or inherent jurisdiction of the court seeking an order that Lot 21 be sold to him and/or the petitioner based on a first right of refusal at the price of RM10,075,000 ('encl 61'); and

(d) TKC filed an application pursuant to s 237(3) of the Companies Act 1965 and/or ss 478, 487(3), 486(1)(a) of the Companies Act 2016 and O 92 r 4 of the Rules of Court 2012 seeking for an order that Properland properties be sold by way of open tender to the highest bidder based on the valuation prepared by a valuer ('encl 92').

[7] TKT and Yew Fooi contended that during the contributories' meeting which was held on 29 January 2016, the joint liquidators had in fact notified that they have decided to dispose Lot 21 by giving TKT the first right of refusal to purchase it for the sum of RM10,075,000. Lot 21 was valued by a valuer commissioned by the joint liquidators themselves. TKT accepted the offer made by the joint liquidators and an agreement was entered between the joint liquidators and TKT. Yew Fooi in his affidavit explained that the proposed right of first refusal method is the preferred method of realisation of Properland's properties after having considered the market value of the property as well as the historical background. TKT has been operating business on Lot 21 for almost 37 years. The joint liquidators was of the opinion that in the event that Lot 21 is not sold to TKT and/or the petitioner, it may cause irreparable damage and severe hardship to the ongoing business.

[8] Onn Kien Hoe, on the other hand, stated otherwise in his affidavit. He admitted that he had initially agreed with the proposal made by Yew Fooi during the meeting on 20 June 2016 but at another meeting held on 25 November 2016, he had a change of mind and decided against the offer of first right of refusal to TKT. TKC in his affidavit stated that it would be in the best interest of Properland, the creditors, and ultimately the contributories that Lot 14 and Lot 21 be sold at the highest purchase price by open tender. He further contended that there was in fact no agreement by the joint liquidators giving the right of first refusal to TKT to purchase Lot 21. TKC further stated that he, himself had offered to purchase both Lot 21 and Lot 14, and had given two banker's cheques as earnest deposits to show his seriousness to purchase the Properland properties. TKT on the other hand did not.

THE HIGH COURT

[9] As the four applications are interrelated, the learned High Court judge heard all of the applications together. The learned High Court judge considered the arguments of the parties and concluded that since TKC, as well as Onn Kien Hoe objected to the method that was initially agreed upon, the proposal by the joint liquidators would not be the best option and instead a sale by open tender would be in the best interest of Properland and the

contributories. Furthermore, it will not cause any prejudice to the parties. Her Ladyship was of the view that due to the objection by TKC and Onn Kien Hoe it will not be appropriate to dispose of the properties as originally agreed.

[10] The learned High Court judge dismissed both encls 61 and 63, and allowed encls 92 and 67 respectively (TKC and Onn Kien Hoe's applications). The Properland properties are to be sold by open tender to the highest bidder and that the reserved price shall be as per the updated valuation by the appointed valuer:

(a) the three properties are to be sold by open tender to the highest bidder; and

(b) the reserved price shall be fixed as per the updated valuation by KGV International Property Consultants (M) Sdn Bhd (KGV).

[11] The learned judge's reasons are summarised as follows:

(a) initially, the joint liquidators agreed to dispose of the properties by way of first right of refusal. TKC objected to the method of disposa;

(b) subsequently, Onn Kien Hoe had a change of mind and proposed a new method for the disposal;

(c) the court is of the view that due to the objection, it is not appropriate to dispose of the properties in the way the joint liquidators originally agreed; and

(d) the court is of the view that open tender method is beneficial to the company and its contributories and that it will not cause any prejudice to the parties.

THE COURT OF APPEAL

[12] Aggrieved by the decision of the High Court, TKT and the petitioner appealed against the decision of the High Court. The joint liquidators did not file any appeal against the High Court's decision.

[13] At the outset of the hearing of the appeals, the Court of Appeal had attempted to amicably resolve the disputes. The parties, however, could not reach a settlement as proposed by the court. Counsel for TKT and the petitioner informed the court that they proposed that Properland's properties be priced at the market value to be updated by KGV.

[14] Learned counsel for TKC, however, argued that the order granted by the learned High Court judge is non-appealable as it is not a decision but a mere direction. The relevant issue is whether the High Court can interfere with the

exercise of discretion of the joint liquidators under the CA and the High Court judge was plainly wrong to have concluded that due the objection by one of the contributories and a member of the joint liquidators, it was not proper or appropriate to dispose the properties in accordance to the original agreement. The Court of Appeal took the view that there was error in the judge's approach and held that the High Court had interfered with the scope of powers of the joint liquidators under s 236(2) of the CA 1965.

[15] The liquidators have wide powers under the CA to do any act as specified under s 236. The Court of Appeal was of the considered view that TKT had unequivocally accepted the offer of the first right of refusal in respect of Lot PT 21 to purchase at the price of RM10.075m as stated in KGV's valuation report. This acceptance was recorded in the minutes of the contributories meeting on 29 January 2016. Onn Kien Hoe had admitted to this in his email dated 23 February 2016. The Court of Appeal opined that the conduct of the joint liquidators appointing a professional property valuer to value Properland properties to determine the right price to dispose of the properties shows their clear intention to offer the properties by way of first right of refusal. The High Court judge's decision tantamount to interfering with the scope of powers of the joint liquidators under the CA. The High Court ought not to invoke its supervisory power to substitute the joint liquidators' decision without just cause. The joint liquidators are not prevented from reaching a decision merely by the objection of one contributory and should have proceeded with the realisation of Lot 21 as initially agreed.

[16] According to the Court of Appeal the learned High Court judge failed to consider the current economic climate where it may not be possible to obtain the desired market value through a public tender process and that a public or open tender may protract the liquidation process. The Court of Appeal allowed the appeals on the following terms:

> Appeal 1087 and Appeal 1088:
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> (a) within 30 days from the date of this order, the joint liquidators shall procure an updated valuation based on current market value ('latest valuation report') from KGV International Property Consultants (M) Sdn Bhd ('KGV') of all three properties registered in the name of second respondent notably:
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> (i) Lot PT 21 (Lot A21), Jalan Kuang Bulan, Kepong Garden Industrial Area, 52100 Kuala Lumpur ('Lot 21');
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> (ii) Lot PT 14, Jalan Kuang Bulan (Jalan Kanan), Kepong Garden Industrial Area, 52100 Kuala Lumpur ('Lot 14'); and
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> (iii) Lot PT 949, Lorong Kuang Cermin 2, Taman Kepong, 52100 Kuala Lumpur ('Lot 949').
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> (b) within thirty (30) days from the receipt of the latest valuation report by the appellants and the first respondent, the following shall occur:

In respect of Lot 21:

(i) that the joint liquidators shall sell Lot 21 by way of first right of refusal to the appellants (jointly and/or severally) by way of private treaty with the value stated in the latest valuation report, being the purchase consideration;

(ii) in the event the value for Lot 21 stated in the latest valuation report is lesser than the value stated by KGV in the updated valuation report dated 28 December 2017 ('Valuation Report of 2017'), the value stated in the valuation report of 2017 shall be the purchase consideration for Lot 21;

(iii) within 60 days from receipt of the latest valuation report, the appellants (jointly and/or severally) shall pay to the joint liquidators the purchase consideration and the joint liquidators shall cause to be transferred to the appellants (jointly and/or severally) the issue document of title and/or all other relevant documents to effect the sale and transfer of Lot 21 to the appellants (jointly and/or severally); and

(iv) should the appellants (jointly and/or severally) fail to remit the purchase consideration in respect of Lot 21 within the 60 days stated above, the first respondent shall have the right to purchase Lot 21 from the joint liquidators in the same terms as set out in paras b(ii) and b(iii) above, that is, payment of the same purchase consideration within 60 days from the appellants' failure to remit the purchase consideration.

In respect of Lot 14 and Lot PT 949:

(b) within 30 days from the receipt of the latest valuation report by the appellants and the first respondent, the following shall occur in respect of Lot 14 and PT 949:

(i) that the joint liquidators shall sell Lot 14 and Lot PT 949 by way of first right of refusal to the first respondent by way of private treaty with the value stated in the latest valuation report, being the purchase consideration;

(ii) in the event the value for Lot 14 and Lot PT 949 stated in the latest valuation report is lesser than the value stated by KGV in the updated valuation report dated 28 December 2017 ('Valuation Report of 2017'), the value stated in the valuation report of 2017 shall be the purchase consideration for Lot 21 and Lot PT 949;

(iii) within sixty days from receipt of the latest valuation report, the first respondent shall pay to the joint liquidators the purchase consideration and the joint liquidators shall cause to be transferred to the first respondent the issue document of title and/or all other relevant documents to effect the sale and transfer of Lot 14 and Lot PT 949 to the first respondent;

(iv) should the first respondent fail to remit the purchase consideration in respect of Lot 14 and Lot PT 949 within the 60 days stated above, the appellants (jointly and/or severally) shall have the right to purchase Lot 14 and Lot PT 949 from the joint liquidators in the same terms as set out in

paras b(ii) and b(iii) above, that is, payment of the same purchase consideration within 60 days from the first respondent's failure to remit the purchase consideration.

(v) Liberty clause in the event if both parties require to purchase.

Appeal 1087 and Appeal 1088:

(a) the costs of procuring of the updated valuation report for 2019 (Latest Valuation) by KGV International Property Consultants (M) Sdn Bhd (KGV) for the subject three assets of the second respondent in both the above Appeals and the outstanding costs of KGV's updated valuation report dated 28 December 2017 (KGV's Valuation 2017), amounting to RM25,806.22, may be borne by the first appellant and first respondent equally or by any one party. Such costs as borne by the party or parties may be reimbursed by deducting that amount from the purchase consideration payable by the respective party or parties pursuant to the terms of the counter order.

ANALYSIS AND DECISION

The issue of appealability

[17] The principal issue to be addressed is whether the decision of the court under s 487(3)of Act 777 (s 237(3) of the CA 1965) is appealable or not.

[18] Section 237 of the CA 1965 relates to the exercise and control of the liquidator's powers. For ease of reference, s 237 of the CA 1965 and s 486 of Act 777 are reproduced. Section 237 reads as follows:

(1) Subject to this Part the liquidator shall in the administration of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection.

(2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.

(3) *The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up*.

(4) Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets. (Emphasis added.)

Section 486 of Act 777 also relates to the exercise and control of liquidator's

powers and reads:

> (1) Subject to this Division, the liquidator shall, in the administration of the assets of the company and in the distribution among its creditors, have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall override any directions given by the committee of inspection in case of conflict.
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> (2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than ten per centum in value of the creditors or contributories.
>
> (3) *The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up*.
>
> (4) Subject to this Division, the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets. (Emphasis added.)

[19] Under s 237(3) of the CA 1965 the liquidator in exercising his powers in the administration of the assets of the company and the distribution among its creditors may if necessary seek the court's directions in relation to any particular matter arising under the winding up. To support his argument that the decision of the High Court judge is not appealable learned counsel for the appellant cited the Federal Court case of *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713; [2012] 2 CLJ 501. The facts in *Ooi* are summarised as follows. In *Ooi* two applications were before the winding-up court. One by the majority contributories of Kian Joo Holdings Sdn Bhd (KJH), the company in liquidation, for leave to proceed with legal proceedings against the liquidators for alleged misconduct in a tender of the assets and eventual award to a company called Can-One International Sdn Bhd ('Can-One'). The other application by the liquidators for directions as to whether to complete the sale to Can-One.

[20] In *Ooi* the liquidators were faced with two factions of contributories led by two family members. At the meetings of the contributories, the two factions had offered two differing views on the method of distributing assets with one faction favoring the sale of the KJCFB shares whilst the minority preferred a distribution in specie of those shares. Those views carried into vote where it was decided by the liquidators to sell the shares. The minority contributories challenged to revise that decision in court. The liquidators however, proceeded with the sale which was for some reasons aborted causing the liquidators to convene yet another meeting of the contributories.

[21] Once again the majority of contributories voted in favour of the sale of the shares and another sale was conducted by open public tender. Expressions of interest were received which resulted in offers and improved offers before the liquidators finally accepted the offer by a company called Can-One. The parties who participated in the sale included the respondent in the appeal, family member leading the majority faction which was made through his private vehicle, Gold Pomelo was rejected by the liquidators.

[22] The liquidators informed the contributories of the award to Can-One. The sale was objected by both the minority and majority contributories. The majority contributories alleged that the acceptance of Can-One's offer by the liquidators was tainted with fraud and corrupt practice and consequently illegal, null and void which was denied by the liquidators.

[23] Another meeting of the contributories was convened by the liquidators to formally determine their views on the sale to Can-One, whether such a sale should proceed. All the contributories voted to abort the sale to Can-One. The various parties involved in or related to the sale of the KJCFB shares then file multiple suits in the winding up court. There were allegations of fraud and corrupt practices by the liquidators. Motions were also filed seeking, inter alia, an order for the removal of the liquidators, and an order that the majority contributories be granted leave to proceed with their civil suit which was commenced without the requisite leave. The minority contributories applied to strike out the majority contributories' application whilst Gold Pomelo filed a motion to set aside Can-One's bid at RM1.65 per share and to secure the sale at the price of RM1.55 per share.

[24] The liquidators were unable to proceed with the completion of the winding up and filed applications pursuant to s 237(3) of the CA, seeking the court's directions as to whether to proceed with the sale to Can-One. The High Court allowed the liquidator's motion for directions under the said provision.

[25] Another meeting of the contributories had to be convened by the liquidators to formally determine their views on the sale to Can-One, whether such a sale should proceed. All the contributories voted to abort the sale to Can-One. The various parties involved in or related to the sale of the KJCFB shares then file multiple suits in the winding-up court. Alleging amongst other fraud and corrupt practices by the liquidators. Motions were also filed seeking, inter alia, an order to remove the liquidators, and an order that the majority contributories be granted leave to proceed with their civil suit which was commenced without the requisite leave. The minority contributories applied to strike out the majority contributories' application whilst Gold Pomelo filed a motion to set aside Can-One's bid at RM1.65 per share and to secure the sale at the price of RM1.55 per share.

[26] The liquidators then filed an application pursuant to s 237(3) of the CA, seeking the court's directions as to whether to proceed with the sale to Can-One. The High Court allowed the liquidator's motion for directions under the said provision.

[27] On appeal the Federal Court opined that the direction or advice given by the High Court under s 237(3) of the CA 1965 is not a judgment or order but purely advisory and administrative in nature. Zulkiflee Ahmad Makinuddin CJ Malaya (as he then was) explained the rationale or the purpose of s 237(3) of the CA 1965:

> ... is to enable a liquidator both to obtain advice and to protect his position as to personal liability in the administration of the winding up. This reasoning has been followed in several Australian decisions. In *Re Security Provident Fund Limited (in liq); Rodger v Gourlay* [1984] 2 ACLC 594 at p 595 the Australian Supreme Court ruled that:
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> > The major matter is that the question asked in the summons (or at least questions 1 and 2) are outside the scope of liquidators' summons for directions. It is clear, upon authority, that sub-s 379(3) does not enable the court to make binding orders in the nature of judgment.
> >
> > The function of a liquidators' summons for directions is to give him advice as to his proper course of action in the liquidation; ...
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> In *Re JW Murphy & PC Allen* [1996] ACSR 569 , the Supreme Court of New South Wales held at p 570:
>
> > an application for directions under s 379(3) of the Companies Code (or s 479(3) of the Corporation Law) is an administrative non-adversary proceeding, and a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding up.

[28] The learned counsel for the appellant also relied on the Court of Appeal's case of the *Estate of Lim Tuan & Ors v Lim San Peen & Ors* [2019] 2 MLJ 306; [2019] 6 CLJ 463 where it was held that directions, as to question of liquidator's fees/entitlement, are merely administrative and as such do not fall come under the provision s 237(3) of the CA 1965. The court had drawn a distinction between purely administrative acts of the liquidator and acts labeled as administrative, but in fact, would affect the rights of other parties.

[29] It is the submission of learned counsel that the High Court's decision concerned the method of disposing properties and does not impinge on any rights of TKT and/or the petitioner and therefore non- appealable. The High Court's decision on the contributories' applications under s 236(3) of the CA 1965 are subordinate to s 237(3) of the CA 1965, and must be consistent with liquidators' non-appealable directions obtained under s 237(3) of the CA 1965, unless it can be proven that their rights are affected by the High Court's

decision. In this case, the appellant has shown that the respondents has not established that either of them has in fact been given any preferential first right of refusal whatsoever.

[30] Learned counsel for the appellant further submitted that there is no documentary evidence disclosing any unconditional and concluded agreement amongst the joint liquidators to give TKT a preference based on the right of first refusal to purchase Lot 21. Thus, without any evidence that there was such right in equity or in law in the first place, the High Court had correctly dismissed the respondents' applications.

[31] In response to the appellant's arguments, learned counsel for the first and second respondents's submitted that the applications before the High Court were specific applications dealing with the substantive rights of the contributories. In support learned counsel cited the Court of Appeal's case of *Equiticorp Holdings Ltd (in statutory management) v Mak Kum Choon & Ors and another appeal* [2020] 6 MLJ 1. In *Equiticorp* the court had extensively examined the principles laid down by *Ooi* and concluded that the court must first examine the factual matrix and circumstances in order to deal with the issue of bona fide and correctness of the application under s 237(3) of the CA 1965. If the directions sought by the liquidators are in fact not the true nature of directions and it is in the form of a final Order affecting the substantive rights of the affected parties, then it becomes appealable. In order to determine whether it is a direction or an order affecting substantive rights, it is important to look into the factual backdrop of the case.

[32] The factual matrix in *Equiticorp* must be distinguished from *Ooi* in order to appreciate the approach taken by the Court of Appeal in *Equiticorp*. In *Equiticorp*, the liquidators filed an application pursuant to s 237(3) of the CA 1965 as they needed to complete the winding-up process of the wound up company, which was wound up more than 18 years ago. The liquidation process ought to have been completed save for this issue of the surplus funds. The directions given were to assist the liquidators to expedite the winding up process.

[33] In *Equiticorp*, the Court of Appeal observed that in *Ooi* the winding up court was not approached for directions on substantive issues of rights or liabilities of any of the parties, but an order seeking the court's direction for the liquidators to proceed with the sale of the shares as decided by the liquidators in the best interest of the wound up company. The Court of Appeal observed that before any court is divested of jurisdiction and competence to hear any matter including an appeal the court must always first examine the propriety of the matter or appeal. It is only where the matter or appeal is not properly within the ambit of the relevant law or bona fides is not established that the

submission of lack of competency is condescended to.

[34] In considering whether the application for direction was properly and correctly initiated, it is incumbent for the court to ask what were the circumstances or reasons for the applications. There was no issue of conclusiveness or finality involved in the directions sought in *Ooi* whereas in *Equiticorp* the directions sought were final orders determinative of substantive rights of various parties.

[35] The Court of Appeal in *Equiticorp* carefully examined and distinguished the facts in *Ooi*'s case:

> [53] When the case authorities referred to and relied on by the Federal Court in *Ooi* are examined, our concerns and considerations are further fortified. One of the cases cited by the Federal Court is *Re Security Provident Fund Ltd (in liq)*. In that decision, it is quite evident that the Supreme Court of the Australian Capital Territory had first asked itself whether the questions posed by the liquidator were within the scope of directions envisaged under their equivalent s 379(3) bearing in mind that that provision does not enable the court to make binding orders, but to give guidance and advice. After answering that question, the Supreme Court proceeded to dismiss the application for directions after finding the 'motion procedurally misconceived' and the directions sought *outside* the scope of s 379(3), that the directions required the court to 'determine finally the rights and liabilities of the company and of the mortgagor rising out of the mortgage'. In dismissing the application, the court held that:
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> > *However much the parties to this application may be in agreement that the determination of these questions on this summons would be convenient, the court should not so determine them, because such a determination might indirectly affect the rights of the company's creditors*, whom the liquidator represents. In principle, the liquidator must assert the rights of the company by a procedure which is capable of determining them fully and finally. Any decision of the court on the questions asked in this summons might well not be binding on either the liquidator or the mortgagor; and it might well be improper for the liquidator to undertake to be bound by the court's decision. Suppose that creditors were dissatisfied with the court's decision, and were advised that it was incorrect: it is at least doubtful whether any appeal would lie: *Re Blackbird Pies (Management) Pty Ltd (No 2)* [1970] QWN 14. (Emphasis added.)
>
> [54] Thus, the issue of the correctness of adopting the procedure under s 379(3) and in our instance, s 237(3) is a necessary and valid threshold question that must first be surmounted before an appeal can be said to be improperly brought over the directions given at the High Court. It is, therefore, in that sense and for those reasons that the Supreme Court in *Re Security Provident Fund Ltd (in liq)* had made the remarks cited by the Federal Court in *Ooi*.

[36] We are mindful that *Ooi* and *Equiticorp* dealt with the application of s 237(3) of the CA 1965. However, it is necessary to distinguish the two cases

not only on the facts but also the basis the orders were granted and the principles applicable in so far as s 237(3) of the CA 1965. The court in *Equiticorp* had concluded that the valid threshold question that must first be surmounted before an appeal can be said to be improperly brought over the directions given at the High Court, in particular if the direction sought is in respect of the assets of the wound up company, would be determinative of the substantive rights and interest of the parties involved in the liquidation. As articulated in *Ooi* and discussed at great length in *Equiticorp* any request for directions must be viewed against the factual matrix of the case before the court.

[37] In contrast to the facts in *Ooi*, the appointed administrator of the wound up company, the joint liquidators, hold divergent views on the methods of realisation of the assets. A liquidator must at all times be impartial, independent, and be seen to be independent. In other words, there cannot be an actual or apparent conflict as what is clearly in existence in the case before us. The joint liquidators in this appeal are clearly not ad idem and in conflict between themselves and also the contributories as to the best method of realisation of the properties.

[38] Where there are conflicting duties of the liquidator, which places the liquidators in a very difficult situation, the best thing for the liquidator is to seek directions of the court as succinctly stated by the Federal Court in *Ooi*:

> [51] This request for directions must also be viewed against the factual matrix of the case whereby for 15 years after the company was wound up, the liquidators have been impeded from completing the winding up of the company by proceedings commenced by the contributories. This cannot go on forever and the liquidators are desirous of obtaining court's directions in respect of the completion of the liquidation. It must be stated here that the liquidators are under a statutory duty to bring the winding up of the company to an early conclusion and this is an important policy consideration behind the winding up provisions.

[39] In this appeal, the divergent views of the joint liquidators not only place both the liquidators in an awkward position but also impedes the liquidation process. The applications and the orders sought by the various parties, that is, the liquidators as well as the two contributors affect the substantive rights of the parties impacted by the liquidation. The Court of Appeal observed that the cautionary approach as emphasised by the Federal Court in *Ooi* suggests that each application must be examined in order to determine its true intent and purpose, before an application under s 237(3) of the CA may be said to be applicable.

[40] The decision of the High Court, in this case, is certainly not purely advisory and neither is it purely supervisory in nature. The order is a judgment

that falls within the ambit of s 67(1) of the CJA and is therefore appealable.

REALISATION OF ASSETS

[41] One must not lose sight of the important role of a liquidator. The joint liquidators' primary concern is to liquidate the company's assets in the most cost-saving and expeditious manner. Both Onn Kien Hoe and Yew Fooi having been appointed as joint liquidators had appointed KGV to value Properland properties. As liquidators, the joint liquidators cannot exercise their discretion arbitrarily but must be based on just and equitable principles, the interest of the wound up company must be paramount.

[42] The details of the disputed properties are as follows:

No	Property	Current Status
1	Lot PT 21 (Lot A21), Jalan Kuang Bulan, Kepong Garden Industrial Area, 52100 Kuala Lumpur ('Lot A21')	Unencumbered land with building tenanted by TBS Sdn Bhd
2	Lot PT 14, Jalan Kuang Bulan (Jalan Kanan), Kepong Garden Industrial Area, 52100 Kuala Lumpur ('Lot 14').	Unencumbered vacant land.
3	Lot PT 949, Lorong Kuang Cermin 2, Taman Kepong, 52100 Kuala Lumpur ('Lot 949').	Unencumbered bungalow.

[43] It is undisputed that the joint liquidators had informed the parties including TKC that a decision had been taken by the joint liquidators to realise the properties in the following manner:

(a) Lot PT 21, the property is to be realised by way of a first right of refusal to be offered to TKT/TBS Sdn Bhd;

(b) Lot PT 14 and Lot PT 949 be offered to TKC by way of first right of refusal; and

(c) the prices for the properties will be as per the valuation by KGV.

[44] Furthermore, TKT had given his unequivocal acceptance of the offer of first right of refusal to purchase Lot 21. This agreed acceptance was recorded in the minutes of the contributories meeting. At that meeting the joint liquidators informed all present including the other contributory, TKC that a decision had been taken by the joint liquidators to realise the properties as mentioned above. TKT had also reaffirmed his acceptance to purchase Lot 21 at the price of RM10,075,000 vide a letter dated 9 May 2016 to the joint liquidators.

[45] Neither TKC nor Onn Kien Hoe as the liquidator adduced any evidence that a public tender would in fact attract a higher price than the market value. An important fact to consider is the possibility that a bidder may offer less than the market value due the costs incurred to demolish the factory on Lot 21. The factory has been there since the early 1980s. There is also the issue of vacant possession since TKT and/or the petitioner have been occupying the premises and operating the factory.

[46] In exercising its supervisory power under s 236(3) of the CA 1965 the High Court must be careful not to exercise its supervisory power beyond the ambit of the provision of the section. The High Court must determine whether the liquidator's action was in good faith and bona fide. The learned High Court judge had accepted the fact the joint liquidators had initially agreed to dispose of Lot 21 by way of first right of refusal. The judge did not find any defect or unreasonableness in the joint liquidators' agreed decision as to the method of realisation. Her Ladyship's decision was based on the objection by TKC that was supported by one of the joint liquidators who had in fact originally agreed to the method of disposal of first right of refusal to TKT. A liquidator is an independent entity and is the guardian of the asset of a wound up company. Hence, any change of an agreed arrangement must be considered with great care especially since there is a difference of views amongst the contributories impacting the whole liquidation process of the wound up company.

[47] The court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way (see: *Ng Yok Gee & Anor v CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, intervener)* [2003] MLJU 835; [2006] 3 CLJ 360).

[48] The Federal Court in *Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor* [2013] 2 MLJ 629; [2013] 3 CLJ 17 emphasised that the court should not interfere unless the conduct of the liquidator was so unreasonable and absurd that no reasonable person would so act. The court will not interfere with the liquidator's decision simply because its opinion might differ from that of the liquidator.

[49] The learned judge was plainly wrong to form her own view that due to the objection, it is not appropriate to dispose of the properties in the way the joint liquidators originally agreed. The learned judge should have instead directed that the properties be disposed of according to the agreed arrangement taken by the joint liquidators as the arrangement would be in the best interest of the company and contributories as well as to expedite the liquidation process.

CONCLUSION

[50] Having carefully considered the submissions of all parties, we agree with the Court of Appeal that the learned judge had plainly fallen into error in granting the application in the terms sought. For the foregoing reasons, questions 1(a), 3, 4, 6, 7 and 8 are answered in the affirmative in that the decisions pertaining to an application under s 236(3) of the CA 1965 in respect of the exercise or proposed exercise of liquidator's power is appealable. Question 5 is answered in the negative. We do not think that it is necessary to answer question 2.

[51] My learned brother, Azahar Mohamed Chief Judge of Malaya, and my learned sister, Rhodzariah Bujang FCJ have sight of the judgment in draft, concur with the reasons given and the conclusions reached.

[52] We, therefore, dismiss the appeals with costs of RM30,000 to the first and second respondent and RM60,000 to Properland, subject to allocator fee. We affirm the decision of the Court of Appeal.

Appeals dismissed.

Reported by Ahmad Ismail Illman Mohd Razali